

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7551

Petition of certain residents of Homestead Acres)
Mobile Home Park in Swanton, Vermont,)
requesting an investigation into the provision of)
water service by Neville Companies, Inc., and)
charges related thereto)

Order entered: 2/9/2010

ORDER RE: MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

By motion dated October 21, 2009, HMHP, Inc., and Neville Companies, Inc. (collectively the "Respondent"),¹ seeks summary judgment in this Docket to dismiss the petition of nine residents (collectively the "Residents" or "Petitioners") of the Homestead Acres Mobile Home Park ("Homestead") in Swanton, Vermont, filed with the Vermont Public Service Board ("Board") on July 22, 2009, requesting an investigation into the provision and billing of water service to Homestead by the Respondent. The Respondent argues that it is not engaged in the business of selling water to the Residents, and that therefore the Board lacks regulatory jurisdiction in this matter and must deny the Residents' petition.

As discussed below, upon review of the motion and responses of all of the parties, the Respondent's motion for summary judgment is denied.

II. BACKGROUND

On October 21, 2009, the Respondent filed its motion and supporting memorandum of law with the Board arguing that the petition must be denied because the Respondent is not

1. The Department of Public Service points out in its filing of December 10, 2009, that the Respondent had initially identified itself as Neville Companies, Inc. at the Prehearing Conference held on September 25, 2009. However, with the filing of its October 21 motion, the Respondent now identifies itself as HMHP, Inc. For the purposes of this Order, I will treat both Neville Companies, Inc., and HMHP, Inc., as litigants in this Docket until the Respondent's correct identity can be established.

"engaged in the collecting, sale and distribution of water," as set forth in 30 V.S.A. § 203(3), thus precluding the Board from exercising its regulatory jurisdiction in this matter. The Respondent asserts that it stopped charging the Residents for water service in October, 2001, and since then has only billed them for sewer usage which the Board does not regulate.

On November 30, 2009, the Clerk of the Board issued a memorandum requesting that the parties submit comments regarding the Respondent's motion by December 7, 2009.

On December 3, 2009, the Vermont Department of Public Service (the "Department") filed a letter with the Board requesting a three-day extension of the deadline for responses from December 7 to December 10, 2009. Without objection, I granted the extension request on December 3.

On December 10, 2009, the Department filed a memorandum in opposition to the Respondent's motion. In its memorandum, the Department argues that evidence obtained in discovery shows that the disputed charge is in fact a charge for water service disguised as a sewer charge. Consequently, the Department recommends that the Board take jurisdiction in this matter, deny the Respondent's motion, and set a proposed schedule for litigation.

The Respondent filed a response to the Department's memorandum on December 23, 2009. In its reply, the Respondent reiterates its original argument that it is engaged in charging for sewer services only and not the sale of water, and that therefore the Board lacks regulatory jurisdiction in this matter. In addition, the Respondent asserts that the Department's opposition to the motion for summary judgment must fail because the Department's filing does not provide a brief statement of material facts as required by Rule 56(c)(2) of the Vermont Rules of Civil Procedure. The Respondent contends that Under Rule 56, an opposing party to a summary judgment motion must include "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." The Respondent argues that recent court decisions on this issue by the Vermont Supreme Court, and the lower Vermont courts, have favored a strict application of this requirement.² "As a result, the Respondent

2. The Respondent cites *Webb v. LeClair*, 2007 VT 65, ¶ 4, 182 Vt. 559, 560, 933 A.2d 177, 178-79; *Gallipo v. City of Rutland*, 2005 VT 83, ¶¶ 28-29, 178 Vt. 244, 247, 882 A.2d 1177, 1187; *Boulton v. CLD Consulting Eng'rs, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413, 427, 834 A.2d 37, 48;

asserts that the Department's opposition to the motion must be denied and the Respondent's Statement of Undisputed Facts must be admitted by the Board.

On January 4, 2010, the Department filed written response to the Respondent's December 23 filing arguing that its opposition to the summary judgment motion should not be denied on procedural grounds. The Department concedes that it did commit a procedural error under Rule 56 by not providing a brief statement of material facts in its December 10 memorandum, but argues that the Respondent's interests have not been prejudiced by that error and that the error is not sufficient to prevent the Board from reaching the merits of the pending motion. Further, the Department contends that its memorandum identifies certain factual assertions made by the Respondent that the Department disputes and that it provides a proper legal analysis supporting the Board's jurisdiction in this proceeding. The Department also reiterates its argument that the disputed charges are for water and not sewer services, and that the Respondent's reply fails to firmly establish the Board's lack of jurisdiction in this matter. A brief statement of material facts, pursuant to the requirements of Rule 56, was included by the Department in its January 4 filing.

III. DISCUSSION AND CONCLUSION

The Respondent has requested summary judgment in this proceeding under Rule 56 of the Vermont Rules of Civil Procedure and Board Rule 2.219. In support of its motion, as outlined above, the Respondent argues that it is engaged in the business of providing sewer services to the Residents of Homestead for a set fee and that it does not sell water services to the Residents. As a result, the Respondent contends that the Board lacks regulatory jurisdiction in this proceeding under 30 V.S.A. § 203(3), which applies only to the collection, sale and distribution of water. The Respondent denies the Department's assertion that the Respondent's form of billing for this service is merely an attempt by the Respondent to avoid Board jurisdiction by camouflaging the charge for water service as a charge for sewer. Secondly, the Respondent argues that the Department's opposition to the motion must fail on procedural grounds since the Department failed to comply with Rule 56(c)(2) by not providing a brief statement of material facts in its December 10 memorandum as required.

The procedures and requirements set out under Rule 56, and as incorporated by Board Rule 2.219, dictate that summary judgment shall be rendered if: ". . . the pleadings, depositions,

answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."³ Under this two-part standard, the Respondent must establish that there is no genuine issue of material fact and that the Respondent is entitled to judgment as a matter of law.⁴ In addition, in determining whether there is a disputed issue of material fact, the opposing party (the Department) to the summary judgment is entitled to the benefit of all reasonable doubts and inferences.⁵

Based upon my review of the filings by both parties, I conclude that the Respondent has not met its burden under Rule 56(c)(2) in establishing that there is no genuine issue of material fact in this proceeding. As the Department sets out in both of its filings of December 10 and January 4, there are genuine issues of fact which are in dispute involving the question of whether or not the Respondent is actually engaged in the sale of water and the Respondent's billing practices for providing water and sewer services. Based on the filings, and the reasonable doubts raised by the Department, the following material facts are in dispute: a) whether the disputed charge was originally intended to include both water and sewer; and b) whether the Respondent's new billing methodology includes a water component. Thus, I am unable to conclude that the Respondent is entitled to judgment as a matter of law on the issue of whether or not the Board has legal jurisdiction. Consequently, I find that the Department has demonstrated that sufficient evidence exists to create a triable issue in this proceeding.

Therefore, Respondent's motion for summary judgment is denied and I request that the parties submit proposed schedules for litigation. The proposed schedules must be submitted to the Board by February 19, 2010.

As to the Respondent's request to deny the Department's opposition and grant summary judgment based on the Department's failure to comply with the technical requirements of Rule 56(c)(2), I am persuaded by the Department's arguments on this issue. Such noncompliance does

3. V.R.C.P. 56(c)(3).

4. *Samplid Enterprises, Inc. v. First Vermont Bank* (1996) 165 Vt. 22, 676 A.2d 774; *Zukatis v. Perry* (1996) 165 Vt. 298, 682 A.2d 964; *Messier v. Metropolitan Life Insurance Co.* (1990) 154 Vt. 406, 578 A.2d 98; *Wesco, Inc. v. Hay-Now, Inc.* (1992) 159 Vt. 23, 613 A.2d 207.

5. *Id.*

not prejudice the Respondent's case in this matter and does not constitute sufficient grounds to grant the Respondent's motion. The facts at issue in this case are not unduly complex and were clearly and concisely set out in the Department's December 10 memorandum. Thus, it was not necessary to undertake a "needle in a haystack" search to get at the heart of the contested issues in this proceeding.⁶ In addition, unlike most civil court proceedings, this case does not involve a private dispute among the parties. Instead, this is a regulatory proceeding that must consider the public good. As such, a technical deficiency in the pleadings is not sufficient grounds for precluding the regulatory protections to which Respondent's customers may be entitled under Vermont Statutes. Therefore, Respondent's request to deny the Department's opposition to summary judgment is denied.

SO ORDERED.

Dated at Montpelier, Vermont, this 9th day of February, 2010.

s/Jay E. Dudley
Jay E. Dudley
Hearing Officer

OFFICE OF THE CLERK

FILED: February 9, 2010

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

6. *Webb v. LeClair*, 2007 VT 65, ¶ 6, 182 Vt. 560, 933 A.2d 177.